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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE I. GUTIERREZ and JOSE A. CARPINTERO, Defendants and Appellants.	B202561 (Los Angeles County Super. Ct. No. PA057684)

APPEAL from judgments of the Superior Court of Los Angeles County, Robert J. Schuit, Judge. Affirmed.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant Jose I. Gutierrez.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant Jose A. Carpintero.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Susan Sullivan Pithey, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants Jose Ignacio Gutierrez and Jose Antonio Carpintero of one count of carjacking and one count of robbery. (Pen. Code, §§ 211, 215.)[1] As to both defendants, the jury found true firearm-use, street-gang, and principal-armed use enhancements. (§§ 12022.53, subd. (b), 186.22, subd. (b)(1)(C), & 12022.53, subds. (b) and (e)(1), respectively.) The court sentenced each defendant to state prison for 25 years to life. Defendants appeal, and we affirm.

FACTUAL BACKGROUND

Around 1:00 a.m. on November 6, 2006, defendants Gutierrez and Carpintero carjacked and robbed Donato Murillo. At the time, Murillo was living out of his car, a silver Monte Carlo. He was parked in front of the home of a friend, Isidro Rodriguez, in Pacoima when he saw two men approaching. Murillo got out of the car to urinate in front of a neighbor's house. Then, using his cell phone, he called his friend Rodriguez and asked if he could enter Rodriguez's house.

He was still on the phone when the two men confronted him. One of the men, who wore a Pittsburgh Steelers jersey and was later identified as defendant Carpintero, pointed a long-barreled revolver at him. The other, who wore a blue North Carolina windbreaker and was later identified as defendant Gutierrez, asked where he was from. Murillo replied that he was from nowhere and had grown up in Pacoima. Gutierrez demanded money. He referred to "Project Boys," and said, "This is Project's neighborhood. You know where you're at." When Murillo said

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[1] The trial court granted defendants' motion for judgment of acquittal (Pen. Code, § 1118.1) on one count of robbery. Hereafter, all undesignated section references are to the Penal Code.

he did not have any money, Carpintero took Murillo's cell phone from his hand. Gutierrez then demanded Murillo's necklaces, and Murillo surrendered them.

By this time, Isidro Rodriguez had come out of his house and joined Murillo. At some point, Carpintero gave the gun to Gutierrez, who then pointed it at Rodriguez. Defendants demanded Murillo's car keys. At Rodriguez's urging, Murillo gave them up. Gutierrez told Murillo that he would leave the car at the corner of Glenoak Boulevard and Pierce Street. Defendants then left in the car.

Using Rodriguez's cell phone, Murillo called 911 (a recording of the call was played for the jury). Officers responded. Later that morning, around 8:05 a.m., Los Angeles Police Sergeant Louis Vince observed Murillo's car in the parking lot of a 7-Eleven convenience store on Glenoak Boulevard, about one-and-a-half miles from Rodriguez's house. Gutierrez got out of the driver's side, and Carpintero got out of the passenger's side. A back-up officer, Officer Trevor Silvera of the Los Angeles Police Department, arrested defendants. In a search of Gutierrez, who was still wearing the North Carolina jersey, Officer Silvera found Murillo's keys, one of his gold chains, and a Bank of America card bearing Murillo's name.

Los Angeles Police Detectives John Franco and Shephard interviewed Gutierrez after advising him of his *Miranda* rights. A recording of the interview was played for the jury, and a transcript made available. In the interview, Gutierrez admitted taking Murillo's car, denied using a gun, and claimed that he acted alone. We discuss the contents of the interview in more detail, below, in connection with Gutierrez's contention that his trial attorney was ineffective.

In a search of Gutierrez's residence, a converted garage in Pacoima, Detective Franco recovered a billing statement bearing Murillo's name, and a photograph depicting members of the Project Boys gang. In a shed on the property, he found a loaded handgun and mail bearing Murillo's name.

At trial, Murillo identified Carpintero as the assailant who wore the Pittsburgh Steelers jersey and pointed the gun at him and took his car. He had also selected Carpintero's photograph in a photographic lineup on November 7, 2006, the day after the crimes. Murillo was unable to identify Gutierrez at trial. However, in a separate photographic lineup on November 7, he selected Gutierrez's photo, saying, "I think the guy . . . is the suspect because he was the one asking where I was from, but his skin is a little lighter."[2]

At trial, Isidro Rodriguez testified that he did not want to be there. He told the prosecutor he was afraid to testify because of where he lived. Before trial, at a photographic lineup on November 7, 2006, Rodriguez had selected Carpintero's photograph. He stated that Carpintero "looks like [the] suspect because of facial features, pointy nose, dark-skinned. I could picture him wearing a Pittsburgh Steelers jersey. He also had . . . the gun first, and then handed it to the other suspect."[3]

Los Angeles Police Officer Tom Gutierrez testified as a gang expert to establish the elements of the gang enhancement. We discuss his testimony in greater detail, below, in connection with defendants' contention that his testimony was insufficient to support the gang enhancement.

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[2] At the preliminary hearing, Murillo had failed to identify either defendant. Before the hearing, he told the prosecutor that he did not want to identify anyone.

[3] At the preliminary hearing, Rodriguez testified that if forced to testify at trial, he would not identify anyone. He told a police detective that he was fearful of testifying because of where he lived.

DISCUSSION

1. *Sufficiency of the Evidence of Gutierrez's Guilt*

Defendant Gutierrez contends that the evidence was insufficient to prove his identity as one of the two men who robbed and carjacked Murillo. We disagree. The crimes occurred around 1:00 a.m. on November 6, 2006. At around 8:05 a.m. that morning, Gutierrez was arrested with Carpintero after they exited Murillo's car. When he was arrested, Gutierrez was wearing a North Carolina jersey (as was one of the robbers), and he possessed on his person Murillo's keys, one of his gold chains, and a Bank of America card bearing Murillo's name. In a search of Gutierrez's residence, Detective Franco recovered a billing statement bearing Murillo's name. In a shed on the property, he found a loaded handgun and mail bearing Murillo's name. Although Murillo did not identify Gutierrez at trial or at the preliminary hearing, in a separate photographic lineup on November 7 (the day after the crimes) he selected Gutierrez's photo, saying, "I think the guy . . . is the suspect because he was the one asking where I was from, but his skin is a little lighter." In his statements to Detectives Franco and Shephard, Gutierrez took full and sole responsibility for the crimes, though he denied using a firearm. Undoubtedly, a rational jury could conclude from this evidence that Gutierrez was one of the two assailants who robbed and carjacked Murillo. (See *People v. Frye* (1998) 18 Cal.4th 894, 953 [reviewing court determines whether, viewing all evidence in light most favorable to the judgment, any rational trier of fact could find guilt beyond a reasonable doubt].)

Gutierrez also contends that the evidence was insufficient to prove that he used a firearm (§ 12022.53, subd. (b)). Again, we disagree. At trial, Isidro Rodriguez was an extremely reluctant witness. He admitted telling the officers who responded to the 911 call that one of the men pointed a gun at him and said, "What are you going to do about it." He also admitted that in selecting defendant

Carpintero's photograph in a pretrial photographic lineup, he stated that he "could picture [Carpintero] wearing a Pittsburgh Steelers jersey. He also had . . . the gun first, *and then handed it to the other suspect*." (Italics added.) The other suspect, of course, was defendant Gutierrez.

At trial, when asked whether the suspect in the Pittsburgh Steelers jersey (Carpintero) handed the gun to the other assailant (Gutierrez), Rodriguez testified, "Right." Further, when asked whether the assailant in the Pittsburgh Steelers jersey (Carpintero) or the other assailant (Gutierrez) said "what are you going to do about it," he testified, "I believe it was the first guy" meaning "not the one with the Pittsburgh Steelers jersey."

This evidence was sufficient to prove that during the crimes, Carpintero gave the gun to Gutierrez, who pointed it at Rodriguez and asked, "What are you going to do about it." True, at trial, Rodriguez also gave equivocal testimony regarding whether he actually saw a gun. He testified that he saw one of the assailants give "something" to the other, and that he was not positive it was a gun. The jury, however could reasonably infer that what was transferred between the assailants was the firearm, and that Rodriguez's reluctance to admit seeing the firearm was due to his fear of retaliation from testifying.

2. *Sufficiency of Evidence of the Gang Enhancement*

Carpintero and Gutierrez make several challenges to the sufficiency of the evidence to prove the gang enhancement allegation under section 186.22, subdivision (b)(1), none of which is persuasive.

Section 186.22, subdivision (b)(1), applies to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." A "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, *having as one of its primary activities the commission of one or more of* [*certain specified crimes*], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in *a pattern of criminal gang activity*." (§ 186.22, subd. (f), italics added.) "A pattern of criminal gang activity," in turn, is defined in relevant part as "the . . . conviction of two or more of [certain listed offenses], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

a. *Pattern of Criminal Gang Activity and Primary Criminal Activity*

To prove a pattern of criminal gang activity by the Project Boys gang and the primary criminal activities of the gang, the prosecution relied on expert testimony from Officer Tom Gutierrez. Officer Gutierrez had spoken to gang members, investigated gang crimes, and made arrests for those crimes. For approximately a year and a half, he had monitored two specific gangs, one of which was the Project Boys, a gang of approximately 300 members. Before that, he was trained by his predecessor, Officer Rodriguez, who had monitored the Project Boys for approximately five years.

At trial, Officer Gutierrez testified that the Project Boys' primary criminal activity involved "robberies, attempt robberies, criminal threats, carjackings, murder, [and] attempt murder." He identified abstracts of judgment from three cases reflecting convictions of predicate offenses. The first, in the name of Rene Maldonado, showed convictions of two counts of attempted murder in January 2003. The second, in the name of Moises Garcia, showed convictions of attempted murder and shooting at an inhabited dwelling in December 2005. The third, in the name of Jesus Gaspar Ascencio, showed a conviction of assault with a deadly weapon in November 2005.

Officer Gutierrez opined that each defendant named in the abstracts of judgment was a Project Boys gang member. He knew of Rene Maldonado "by speaking with Officer Rodriguez," the predecessor gang officer who monitored the Project Boys. He had also seen photographs of Maldonado's tattoos. From his training and experience, Officer Gutierrez knew Maldonado to be a Project Boys gang member in 2003 through 2006. As to Moises Garcia, Officer Gutierrez knew him to be a Project Boys member from 2004 through 2005 based on his experience working with Officer Rodriguez and monitoring the Project Boys gang. Similarly, from his training and experience, Officer Gutierrez knew Jesus Gaspar Ascencio to be a Project Boys gang member in 2005.

Defendants contend that Officer Gutierrez had an insufficient foundation to testify that the persons named in the abstracts of judgment were Project Boys members. We disagree. When referring to his training and experience as a basis for his opinion that the persons named in the abstract belonged to the Project boys, Officer Gutierrez was referring to the qualifications he initially described in his testimony: personal experience in gang cages, his monitoring of the Project Boys, and his training by his predecessor. Such sources of information are the type reasonably relied upon by experts. They created an adequate foundation for his opinion that the persons named in the abstract of judgments were Project Boys members. They also provided an adequate basis for his opinion concerning the primary criminal activities of the gang. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 [gang expert testimony based on conversations with gang members, investigations, and information from colleagues, sufficient to prove primary criminal activity of gang]; *People v. Gardeley* (1996) 14 Cal.4th 605, 620 [same].)

Defendant Gutierrez argues that this case is similar to *In re Alexander L.* (2007) 149 Cal.App.4th 605, in which the court found the gang officer's opinion insufficient to prove the primary criminal activity of the gang. In that case, however, it was "impossible to tell whether [the officer's] claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay." (*Id.* at p. 612.) Here, by contrast, Officer Gutierrez's knowledge was obtained through training received from a long-time gang officer who monitored the Project Boys, his own monitoring of the gang for approximately one and a half years, and his prior experience with gang members and gang cases. Thus, *Alexander L.* is inapposite

Defendant Gutierrez contends that the prosecution failed to prove that the actors in the predicate offenses committed the crimes in connection with, or for the benefit of, the Project Boys. As here relevant, the statutory requirement is proof that members of the gang "individually or collectively" (§ 186.22, subd. (f)) have been convicted of two or more predicate crimes. As we have explained, Officer Gutierrez's testimony met that requirement. There is no additional requirement that the prosecution offer expert testimony that the predicate crimes were committed for the benefit of the gang.

b. *Present Crimes Committed for the Benefit of the Gang*

The prosecutor asked Officer Gutierrez a lengthy hypothetical question, asking him to assume certain facts based on the circumstances of the instant crimes. Asked if he had an opinion whether the assumed crimes were committed for the benefit of Project Boys, Officer Gutierrez testified that he "believ[ed]" they were. He based his opinion on the perpetrators' having announced their gang affiliation, thus instilling fear in the victim and anyone else who might have heard the declaration. He also noted that the crimes were committed in Project Boys' territory. He opined that the commission of the crimes would elevate the status of the gang members within the gang. As he explained, within the gang "you're looked up to" based on the seriousness of the crime committed. He also testified that the commission of the assumed crimes "elevates the status of the gang by creating . . . fear and intimidation within the community. Now people in that community know that the Project Boys are in their neighborhood too."

Defendant Gutierrez contends that Officer Gutierrez's opinion that the commission of the crimes tended to elevate defendants' status within the gang was "pure speculation and without any evidentiary support." Not so. The opinion was based on Officer Gutierrez's knowledge of gang culture. Moreover, defendant Gutierrez as much as announced that he was committing the crimes for the benefit of his gang. He began the confrontation with a common question asked by gang members: "Where are you from?" He then made clear his motive for the crime: "This is Project's neighborhood. You know where you're at." Defendant Carpintero signaled his concurrence with the sentiment by holding the gun on Murillo during Gutierrez's declaration and by fully participating in the crimes. The conclusion that defendants committed the crimes for the benefit of the Project Boys and to elevate their status in the gang was hardly a leap of logic.

Carpintero contends that Officer Gutierrez's testimony that Carpintero was a Project Boys gang member was "nothing more than hearsay," and was insufficient to prove that he belonged to the Project Boys. Officer Gutierrez testified that he knew of Carpintero through his training and experience and through his conversations with Officer Rodriguez, his predecessor gang officer. He "was advised" that Carpintero was an active member of the Project Boys with the moniker "Tone."

Carpintero did not object to this specific testimony at trial, and thus has forfeited any objection on appeal. Further the fact of Carpintero's gang membership was not a required element of the gang allegation. (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 206-207.) In any event, strong circumstantial evidence proved Carpintero's membership in the Project Boys. During the crimes, he wore a Pittsburg Steelers jersey, which, according to Officer Gutierrez, is common Project Boys garb. He participated in the crimes with defendant Gutierrez, an admitted Project Boys member,[4] in Project Boys territory. Further, Carpintero signaled his membership by pointing a gun on Murillo as defendant Gutierrez announced the gang-related motive for the crimes: "This is Project's neighborhood. You know where you're at." This evidence convincingly established Carpintero's membership in the Project Boys, and his intent to commit the crimes for the benefit of the Project Boys.

Carpintero contends that Officer Gutierrez's testimony concerning the gang motive for the crime "is almost indecipherable," and that "[i]t is virtually impossible to follow the line of thought" and to distinguish when the officer is referring to the purported gang members and when he is referring to the purported victim. To the contrary, the entire opinion testimony is easily decipherable, and ends with a clearly stated point: the gang members' commission of the crimes "is going to create fear and intimidation. And it elevates their status. It elevates the status of the gang by creating that fear and intimidation within the community.

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[4] Officer Gutierrez knew defendant Gutierrez from having stopped him on one past occasion. Defendant Gutierrez admitted being a Project Boys member with the moniker "Pork." Defendant Gutierrez has two tattoos marking him as a Project Boys member: one near his right elbow that says "PJB" and one on his forearm that says "PJ." In a search of defendant Gutierrez's residence, Detective Franco seized a photograph of Project Boys members.

Now people in that community know that the Project Boys are in their neighborhood too."

c. *Reliance on Secondary Sources*

To the extent Officer Gutierrez's opinion testimony was based on information from Officer Rodriguez (his predecessor) or other secondary sources, defendants contend that his testimony put before the jury inadmissible hearsay in violation of *Crawford v. Washington* (2004) 541 U.S. 36. As conceded by defendant Gutierrez, two prior decisions have rejected the argument. (See *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427 ["Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned"]; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210 [same].) We agree with these decisions.

3. *Alleged Ineffectiveness of Gutierrez's Counsel*

Defendant Gutierrez contends that his trial counsel was ineffective, because: (1) he failed to move to suppress Gutierrez's statements to the police, and (2) he did not join in Carpintero's motion to sever. Gutierrez fails in his burden to show ineffective assistance.

"To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*In re*

Neely (1993) 6 Cal.4th 901, 908-909, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).)

a. *Gutierrez's Statements*

At trial, the prosecutor and Gutierrez's counsel stipulated to the playing of a recording of Gutierrez's interrogation by Detectives Shephard and Franco. A transcript of the interrogation was provided for the jury.

In the beginning of the interrogation, Detective Shephard introduced himself and Detective Franco and obtained background information from Gutierrez. In the course of obtaining the background information, Detective Shephard, who was acquainted with Gutierrez, engaged in innocuous conversation, asking, for example, about Gutierrez's baby and the baby's mother and commenting on Gutierrez's weight. Detective Shephard then stated that he was going to ask Gutierrez questions about what had happened the previous night and that Gutierrez would have the chance "to tell . . . about why and what you were thinking and all that stuff." He then said, "Let's make it official. . . . [Y]ou understand your rights 'cause I've read them to you before, but I do it every time so you know what's up. So you know that I'm on the table." Detective Shephard then advised Gutierrez of each of his *Miranda* rights. After stating each right, he asked if Gutierrez understood. Gutierrez stated that he did.

In the transcript, immediately following the advisement, 24 lines of dialogue were redacted. The transcript resumes with Detective Shephard telling Gutierrez: "All right, bro. . . . I'm going to ask you some questions about last night. I want to make sure that it's not worse than it seems. . . . I just want to lay it all out. We – you know that – that we talked about it before that we already know what happened. We got the reports and the victim and all the evidence. . . . So we'll just lay it out specifically so you're not getting something more than you deserve."

Gutierrez expressed his desire to be honest with the detectives ("I know to be honest with you." "I know I'll still be honest.")

Detective Shephard asked whether Gutierrez was "using dope." Gutierrez replied, "Hell no." Another redaction of six lines followed. Then Detective Shephard asked, "Are you straight?" Gutierrez responded, "Well, I told you I'm in a bomb ass (Inaudible). . . . I told you I was in a bomb ass (Inaudible) right now." He then added, "Bomb ass (Inaudible) right now. No, I (Inaudible) good." Detective Shephard asked, "What was it? . . . Is it beer?" Gutierrez said, "No, crystal."

Detective Shephard then asked Gutierrez to explain what had happened the previous night. Gutierrez took sole responsibility for the crimes against Murillo ("I did that shit myself"). He stated that he "[j]ust liked that car." He admitted taking a necklace from Murillo, but denied taking anything else except the car. He denied using a gun. He referred to being in his "own little world" when driving away in Murillo's car, apparently from ingesting methamphetamine. He stated that after the crimes, he parked at Hansen Dam "going crazy and shit" with a girl. The interview began around 10:40 a.m. and lasted until around 11:00 a.m.

Gutierrez contends that his counsel should have moved to suppress his statements because the detectives did not attempt to obtain a *Miranda* waiver, and, therefore, he did not voluntarily waive his rights. The claim fails for two reasons. First, the record on appeal is insufficient to support the argument that Gutierrez did not expressly waive his rights. In the transcript of the interrogation, following Gutierrez's acknowledgment that he understood the last right of which he was advised -- his right to have a lawyer appointed free of charge before questioning -- 24 lines of dialogue were redacted. Thus, on this record, it is impossible to tell whether in the redacted discussion the detectives obtained an express waiver.

Second, even without an express waiver, Gutierrez impliedly waived his rights – following a full advisement, he declared his intent to be honest with the detectives, and voluntarily answered questions concerning the crimes. (See *People v. Whitson* (1998) 17 Cal.4th 229, 250 [express waiver not required where defendant's actions make clear a waiver was intended]; *People v. Riva* (2003) 112 Cal.App.4th 981, 987-988 [same].) Because there was no valid basis on which to contend Gutierrez did not waive his rights, it is not reasonably probable that had counsel moved to suppress Gutierrez's statements a different result would have been reached. Thus, there is no basis for finding ineffective assistance of counsel. (*Strickland, supra,* 466 U.S. at p. 697 ["If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed"].)

Gutierrez contends that any implied waiver was not voluntary because the detectives engaged him in small talk and friendly conversation before advising him of his rights, thus minimizing the importance of the rights. However, the brief and innocuous pre-admonishment discussion – it consumes only seven pages of transcript – contains nothing even remotely similar to the type of "psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." (*People v. Ray* (1996) 13 Cal.4th 313, 340.) Indeed, the manner in which Detective Shephard advised Gutierrez of his rights, explaining each one and then asking whether Gutierrez understood, tended to emphasize, not minimize, the rights. Thus, trial counsel cannot be deemed ineffective on this ground. (*Strickland, supra,* 466 U.S. at p. 697.)

Gutierrez contends that he was under the influence of methamphetamine during the interview. Even if true – a point that is impossible to assess on this record – mere voluntary intoxication does not invalidate a *Miranda* waiver. Our

Supreme Court "has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication or ingestion of drugs, where . . . there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him." (*In re Clark* (1993) 5 Cal.4th 950, 988; see also *People v. Jackson* (1989) 49 Cal.3d 1170, 1189 [mere fact of voluntary consumption of alcohol does not establish incapacity].) The transcript of the interrogation leaves no doubt that Gutierrez was lucid, responsive, and ready to talk. We find nothing in the transcript to suggest that Gutierrez was so intoxicated that his ability to voluntarily waive his rights was impaired. To the extent the transcript characterizes some responses as unintelligible, such entries, on this record, were just as likely caused by the quality of the recording as by Gutierrez's supposedly slurred speech or confusion. Again, there is no basis on which to find prejudice from trial counsel's alleged failures. (*Strickland, supra*, 466 U.S. at p. 697.)

Finally, Gutierrez contends that trial counsel should have moved to suppress his statements under Evidence Code section 352, because his "drug-induced state, his slurred speech, scores of unintelligible and nonresponsive answers reduce the probative value of these statements to practically nothing." We disagree with Gutierrez's characterization of the record; in pertinent part, his statements were neither nonresponsive nor devoid of probative value. He took sole responsibility for the crimes against Murillo, thereby protecting Carpintero (his fellow gang member) while at the same time attempting to minimize his own culpability by denying use of a gun. There was no basis on which trial counsel could have moved to exclude the statements under Evidence Code section 352. Thus, Gutierrez fails to demonstrate prejudice from trial counsel's alleged failings. (*Strickland, supra,* 466 U.S. at p. 697.)

b. *Carpintero's Motion to Sever*

Gutierrez contends that his trial counsel was ineffective for not joining in a severance motion made by Carpintero. The clerk's transcript on appeal contains a copy of Carpintero's motion and the prosecution's opposition. The clerk's transcript also contains a copy of the minute order reflecting the court's denial of the motion, which states that the "People and defense counsel submit on [the] moving papers and motion is denied." The reporter's transcript on appeal, however, does not contain a transcript of the proceeding on the motion or the courts' ruling. Without a reporter's transcript of what actually transpired, we find the record on appeal insufficient to entertain Gutierrez's contention that his counsel was ineffective for failing to join in Carpintero's severance motion.

In any event, the available record discloses no valid basis on which Gutierrez's trial counsel might have moved for a severance. Gutierrez argues on appeal that the case against Carpintero was stronger than that against Gutierrez, such that Gutierrez was prejudiced by association with Carpintero. To the contrary, the case against Gutierrez was overwhelming. Indeed, he confessed his involvement in the crimes. Moreover, with the exception of Gutierrez's confession (which was admissible against Gutierrez only,) the evidence of the crimes was cross-admissible against both defendants. No competent trial attorney would have moved to sever Gutierrez's case on the ground that a joint trial with Carpintero would result in a prejudicial spillover of evidence.

4. *Denial of Police Reports*

Before trial, Carpintero's counsel requested that the court review two police reports relating to arrests of Donato Murillo for, inter alia, disturbing the peace under section 148, subdivision (a)(1). Although the prosecutor represented that one of the reports contained nothing discoverable (the prosecutor did not have a copy of the other report), defense counsel wanted the court to review the reports to determine if they contained discoverable material under *Brady v. Maryland* (1963) 373 U.S. 83. The court declined, noting that the duty of disclosure under *Brady* is a self-executing duty of the prosecutor, not a duty of the court.

On appeal, Gutierrez contends that the trial court erred in not disclosing the police reports to the defense. We will assume for the sake of argument that Gutierrez's counsel joined in the request and has standing to raise the issue on appeal. As we have noted, the request was not that the reports be turned over to the defense, but rather that the court review them to determine if they contained *Brady* material. In any event, assuming for the sake of argument that the court erred in not disclosing the reports to the defense, the error could not possibly have affected the outcome. The court permitted impeachment of Murillo with a misdemeanor conviction of Vehicle Code section 10851, and Gutierrez's counsel elicited that evidence in his cross-examination of Murillo. Further, the evidence of both defendants' guilt was compelling and unrebutted. Indeed, Gutierrez concedes that the purported error in not disclosing the reports "may not, by itself, compel a reversal."

5. *Jury Instructions*

Carpintero contends that the trial court erred in instructing pursuant to CALCRIM Nos. 223, 226, and 302. He contends that in various ways, these instructions undermined the prosecution's burden of proof beyond a reasonable doubt.

As he concedes, the precise challenges he raises to CALCRIM No. 302 were rejected in *People v. Anderson* (2007) 152 Cal.App.4th 919, 938-940. Similar challenges to CALCRIM No. 302 were also rejected in *People v. Felix* (2008) 160

Cal.App.4th 849, 858, and *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1190-1191. We agree with the analyses of *Anderson*, *Felix*, and *Ibarra*.

As for CALCRIM No. 223, Carpintero contends that by instructing the jury that direct and circumstantial evidence are acceptable "to prove *or disprove* the elements of a charge" (italics added), the instruction implies that the defendant has the duty to present evidence to disprove the charge. Carpintero misreads the instruction. It carries no implication that defendant must disprove the charge. It simply gives the jury essential information on evaluating direct and circumstantial evidence. One part of that information is that both types of evidence are an acceptable means of proof – proof that may tend to establish, or that may tend to defeat, the charge. The instruction says nothing that remotely undercuts the prosecution's burden of proof.

CALCRIM No. 226 instructs the jury on evaluating the credibility of witnesses, and lists various factors the jury can consider, one of which is: "Did other evidence prove *or disprove* any fact about which the witness testified?" (Italics added.) Carpintero contends that by instructing on this factor, the instruction implies that he had the burden of disproving an element of the offense testified to by the witnesses. Again, he misreads the instruction. It merely directs the jury to consider relevant factors that may "reasonably tend[] to prove or disprove the truth or accuracy" of a witness' testimony. Obviously, in its evaluation of a witness' testimony, the jury may – indeed, must in appropriate cases – consider whether other evidence tends to disprove the witness' testimony. Instructing on that principle does not suggest that the defendant has the burden of proof.

Alternatively, Carpintero contends that even if CALCRIM Nos. 223, 226, and 302 are not clearly erroneous, they are at least ambiguous, such that it is reasonably likely the jury would construe them so as to undermine the prosecution's burden of proof. We disagree. The instructions, considered individually and together, carry no likelihood, reasonable or otherwise, that the jury would believe defendant rather than the prosecution carried the burden of proof on any issue.

DISPOSITION

The judgments are affirmed as to both defendants.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.